

## WESTERN MINING ACTION PROJECT

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February 8, 2018

Mark J. Langer, Clerk  
United States Court of Appeals  
for the District of Columbia Circuit  
United States Courthouse  
333 Constitution Avenue, NW  
Washington, DC 20001

Re: Oglala Sioux Tribe v. NRC, No. 17-1059 (oral argument scheduled March 20, 2018)

Dear Mr. Langer:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, Petitioner Oglala Sioux Tribe (“Tribe”) hereby responds to the Rule 28(j) letter submitted by Respondent Nuclear Regulatory Commission (“NRC”) on January 25, 2018.

In its letter, NRC submitted the January 19, 2018 decision in *NRDC v. NRC* (D.C. Cir. No. 16-1298) (“*NRDC Decision*”). NRC asserts that the *NRDC Decision* undermines this Court’s jurisdiction to review whether the NRC acted lawfully in not vacating Powertech’s in situ uranium recovery license despite rulings from the NRC that the license review process violated the National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA). However, the *NRDC Decision* does not support NRC’s arguments, but rather supports the Oglala Sioux Tribe’s positions in this appeal.

The *NRDC* Court specifically rejected NRC’s assertion that the issuance of the license was entirely “provisional” as it immediately authorized mine operations. Slip op. at 12. This recognition that a license – the same as at issue here – is immediately effective and in force upon issuance supports Hobbs Act jurisdiction in this case.

The *NRDC* Court also found the NEPA violation in that case inconsequential because the error was remedied during the administrative process, before any administrative decision on the legality of the license was issued, and before the lawsuit was filed. Slip op. at 13-14. The Court ruled that remand for reconsideration would have been futile since the originally missing information had already been provided and analyzed. *Id.*

The situation in the instant case is significantly distinct. The failure to gather required information necessary to analyze and mitigate cultural resource impacts formed the basis of NRC's NEPA violation. Here, the license remains effective, yet that necessary information has never been gathered, reviewed, or analyzed. Thus, the futility argument is not applicable. Instead, unlike in *NRDC*, the situation here is akin to the situation in *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077 (D.C.Cir. 2016), discussed by the *NRDC* Court, where a remand was required because the relevant information had never been included in the agency's decisions or made available to the public. Slip. Op at 14.

Respectfully submitted,

/s/ *Jeffrey C. Parsons*

Jeffrey C. Parsons  
Counsel for Petitioner Oglala Sioux Tribe

**CERTIFICATE OF SERVICE**

I, Jeffrey C. Parsons, hereby certify that the foregoing Response to Rule 28(j) letter submitted by Oglala Sioux Tribe was served on all counsel of record in case number 17-1059 through the electronic filing system (CM/ECF) of the U.S. Court of Appeals for the District of Columbia Circuit.

/s/ Jeffrey C. Parsons

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